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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 171.

J. A. SIMPSON,
Petitioner,

vs.

THE KANSAS CITY CONNECTING RAILWAY COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF.

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INDEX

Statement of Case 1

Argument—

I. The Petition Should Be Denied Because the Petitioner Is Seeking to Obtain Certiorari on a Question Which the Supreme Court of Missouri Found Unnecessary to Decide 3

II. The Petition for Certiorari Should Be Denied Because It Is Not Based upon Need for Determining an Important Question of Law but Rather upon Questions of Fact As to Which Petitioner Has Failed to Mention Undisputed and Controlling Facts Shown in Evidence 6

III. The Petition for Certiorari Should Be Denied Because under the Law and the Decisions, It Is Clear That the Engine Was Not in "Use" and in "Service" on Defendant's Line at the Time of Plaintiff's Accident 13

Conclusion 22

Aerial photograph showing the roundhouse and scene where the accident occurred 23

TABLE OF CASES

Atlantic Coast Line R. Co. v. *Edge*, 81 Ga.App. 606, 59 S.E.2d 533 20

Boehmer v. *Pennsylvania Railroad Company*, 252 U.S. 496, 64 L. Ed. 680 7

Botto v. *James*, (Mo. Sup.) 209 S.W.2d 256 4

Brady v. *Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614 ..... 6, 17, 18

Caldwell v. *Travelers Insurance Co.*, 305 Mo. 619, 267 S.W. 907 4

Chicago Junction R. C. v. *King*, 222 U.S. 222, 56 L. Ed. 173 7

Compton v. *Southern Pacific Co.*, 161 P. 2d 40, 70 Cal.App. 2d 267 ..... 19, 20

Flack v. *Atchison, T. & S. F. Ry. Co.*, 285 Mo. 28, 224 S.W. 415, cert. den. 256 U.S. 690, 41 S. Ct. 449 ..... 14, 15

Gorman v. *Washington University*, 316 U.S. 98, 62 S. Ct. 962, 86 L. Ed. 1300 6

Hall v. *Brookshire*, 267 S.W.2d 627, 364 Mo. 774 5

Lewis v. *Lewis*, 354 Mo. 415, 189 S.W.2d 557 4

Lyle v. *Atchison, T. & S. F. Ry. Co.*, 177 F.2d 221, cert. den. 339 U.S. 913, 70 S. Ct. 574 14

Morley Construction Co. v. *Maryland Casualty Co.*, 300 U.S. 185, 57 S. Ct. 325, 81 L. Ed. 593 4

New York C. & St. L. R. Co. v. *Kelly*, 70 F. 2d 548, Cer. Denied 293 U.S. 595, 55 S. Ct. 110 ..... 6-7, 14, 15, 17, 19

Sherry v. *Baltimore & Ohio R. Company*, 30 F. 2d 487, Cer. Denied 280 U.S. 555, 74 L. Ed. 611, 50 S. Ct. 16 ..... 7, 14, 15, 17, 19

State v. *Palmer*, (Mo. *En Banc*) 198 S.W.2d 10 4

St. Charles Bank v. *Denker*, 275 Mo. 607, 205 S.W. 208 4

Thorp v. *Daniel*, 339 Mo. 763, 99 S.W.2d 42 4

Tisneros v. *Chicago & N. W. Ry. Co.*, 197 F.2d 466, cert. den. 344 U.S. 885, 73 S. Ct. 184 14

OTHER AUTHORITIES

Boiler Inspection Act, 45 U.S.C.A., Sec. 23 13

House Report No. 1974, 61st Congress, Third Session (Congressional Record, 61st Congress, Third Session, page 2072) 13

Safety Appliance Act, 45 U.S.C.A. 13 16

Supreme Court Rules 19 (a) and 23 (f) 3

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RESPONDENT'S BRIEF.

STATEMENT OF CASE.

Petitioner has stated the facts but has made some statements inaccurately and has omitted other controlling facts. These facts will be referred to in respondent's argument. The principal inaccuracies and omissions are the following: On Page 8 petitioner says that when the engine began leaking steam, "plaintiff backed the engine up

to the place for delivery to the Union Pacific for repairs." This is an inaccurate statement of important and controlling facts. The evidence was undisputed that when plaintiff found that the engine was leaking steam he backed it up but he did not leave it at the point near the oil house which was the place the Union Pacific had designated (Tr. 15, 16, 19, 37, 38 and 39), but he backed it approximately a block or a little further (Tr. 49) and parked it at a spot to the west of and close to the engine dispatcher's office near the roundhouse (Tr. 19, 20, 44, 45). In moving the engine from the place near the oil house to the spot near the dispatcher's office close to the roundhouse, plaintiff was doing the work normally done by hostlers of the Union Pacific (Tr. 46, 48). When plaintiff reached this spot he got down from the engine and he testified that he did not intend to move it any more until the additional repairs were made (Tr. 46).

A second inaccuracy with respect to important and controlling facts is the statement by petitioner (p. 9) that at the time of plaintiff's accident the engine was not at the place where repairs were to be made. This statement is inaccurate and misleading in that it infers that some substantial movement of the engine was needed to take it to the place of repair when in fact the undisputed evidence shows that at the time the engine was setting just outside the roundhouse on a track that entered the roundhouse (Tr. 19, 20, 44, 45 and Pl. Ex. 2).

ARGUMENT.

I.

The Petition Should Be Denied Because the Petitioner Is Seeking to Obtain Certiorari on a Question Which the Supreme Court of Missouri Found Unnecessary to Decide.

Under Supreme Court rules 19 (a) and 23 (f) certiorari is granted only where the state court has *decided* a federal question not determined by this Court, or has *decided* it in a way probably not in accord with applicable decisions of this Court. In this case the Supreme Court of Missouri found it unnecessary to decide any question concerning the Boiler Inspection Act.

When the case was tried, the trial court held that plaintiff did not make a case under the Boiler Inspection Act and sustained defendant's motion for a directed verdict (Tr. 88). Later the trial court granted plaintiff a new trial on the negligence allegations in his petition but denied a new trial of his allegations based on the Boiler Inspection Act. Defendant appealed to the Supreme Court of Missouri from the order granting plaintiff a new trial under the negligence allegations, but plaintiff did not appeal from the order denying him a new trial of his Boiler Inspection Act allegations. Under these circumstances, the Supreme Court of Missouri, *en banc*, held that on defendant's appeal and with no appeal by plaintiff, it was unnecessary that the Court decide questions concerning the Boiler Inspection Act. The Court said (Petitioner's Brief P. A-6):

"The first point briefed by appellant in this court is that 'at the time of plaintiff's accident defendant's

> locomotive had reached the place of repair and was not in "use" or in "service" on defendant's "line" within the meaning of the Boiler Inspection Act', and that plaintiff did not make a case for the jury under the assignments in sub-paragraph (a) of paragraph 5 of his petition. We need not consider that question on this appeal by defendant. The trial court directed a verdict against plaintiff on that issue and the order granting plaintiff a new trial was not based on any error with reference to the trial court's action in that respect. If the motion for a new trial was correctly ruled on the basis stated in the trial court's order, the order must be affirmed."

The reason for such ruling is that it is well established in Missouri that if the order of the trial court includes portions adverse to respondent he cannot attack such portions on appellant's appeal if he did not cross appeal. *St. Charles Bank* v. *Denker,* 275 Mo. 607, 205 S.W. 208; *Caldwell* v. *Travelers Insurance Co.,* 305 Mo. 619, 267 S.W. 907; *Lewis* v. *Lewis,* 354 Mo. 415, 189 S.W. 2d 557; *State* v. *Palmer,* (Mo. *En Banc*) 198 S.W. 2d 10; *Thorp* v. *Daniel,* 339 Mo. 763, 99 S.W. 2d 42; *Botto* v. *James,* (Mo. Sup.) 209 S.W. 2d 256.

This is also the rule in the federal courts. In *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U.S. 185, 57 S. Ct. 325, 81 L. Ed. 593, the Court said, 300 U.S. l.c. 191:

> "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' *United States* v. *American R. Expr. Co.,* 265 U.S. 425, 435, 68 L. Ed. 1087, 1093, 44 S. Ct. 560. What he may not do in the absence of a cross appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he

seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain." (many cases cited).

Plaintiff filed a motion for rehearing in the Supreme Court of Missouri still seeking to have the Court decide the same issue. In its *Per Curiam* opinion on motion for rehearing (shown at Page 16 of the Appendix to the Petition for Certiorari), the Court said (A-17):

> "A divisional opinion supporting the order granting a new trial on the theory mentioned by respondent failed of adoption by the unanimous vote of the court en banc and a ruling on that issue would not support the order of the trial court granting the new trial to plaintiff, hence we do not rule it here."

Accordingly, the Supreme Court of Missouri found it unnecessary to consider the issue upon which petitioner bases his petition for certiorari. In the motion for rehearing, the Court by dicta indicated that if it had gone into the issue, it would have ruled such issue adversely to plaintiff but nevertheless, for the reasons stated, the Court did not rule such issue and it is only upon the inferences and dicta that petitioner seeks certiorari in this Court.

Petitioner has set forth in the Appendix beginning at Page A-19 the divisional opinion but this opinion, because of the dissent of one of the judges, did not become the opinion of the Court, but instead the case was transferred to the Supreme Court, *en banc*, and its opinion under the law of Missouri becomes the only opinion in the case just as though the case had never been before Division 2 of the Court at all. This is the law in Missouri as decided by the Court, *en banc*, *Hall* v. *Brookshire*, 267 S.W. 2d 627, 364 Mo. 774, and cases there cited.

This Court has held that it will concern itself only with the decision of the Missouri Supreme Court, *en banc*.

Gorman v. *Washington University*, 316 U.S. 98, 62 S. Ct. 962, 86 L. Ed. 1300.

Accordingly, for the foregoing reasons, the petition for certiorari should be denied as the Supreme Court of Missouri for good reason and under the law of Missouri, refused to rule the issue which the petitioner did not preserve for review by appeal.

II.

The Petition for Certiorari Should Be Denied Because It Is Not Based upon Need for Determining an Important Question of Law but Rather upon Questions of Fact As to Which Petitioner Has Failed to Mention Undisputed and Controlling Facts Shown in Evidence.

There are no special and important reasons for granting certiorari in this case. The ruling of the trial court that plaintiff did not make a case under the Boiler Inspection Act (the point not ruled by the Supreme Court) is in accord with and not contrary to the decisions including those of this Court. In the next point the cases will be briefly considered. At this time we merely call the Court's attention to the fact that petitioner is not claiming that an important question of law must be decided but is merely claiming that there was sufficient evidence to make a case for the jury on the issue as to whether defendant's locomotive was in "use" and in "service" on defendant's "line" within the meaning of the Boiler Inspection Act, 45 U.S.C.A., Sec. 23.

Under the decisions, the Boiler Inspection Act does not apply if the locomotive is not in "use" and in "service" but has reached the place of repair. *Brady* v. *Terminal Railroad Association of St. Louis*, 303 U.S. 10, 58 S. Ct. 426, 82 L. Ed. 614; *New York C. & St. L. R. Co.* v. *Kelly*,

70 F. 2d 548, Cer. Denied 293 U.S. 595, 55 S. Ct. 110; *Sherry v. Baltimore & Ohio R. Company,* 30 F. 2d 487, Cer. Denied 280 U.S. 555, 74 L. Ed. 611.

Petitioner, however, argues the facts, claiming that the locomotive was in "use" and in "service" and that it had not reached the place of repair but in doing so has failed to mention admitted and undisputed facts showing that defendant's locomotive was not in "use" and in "service" and had reached the place of repair.

It is well established that this Court will not, on petition for certiorari, enter into a minute examination of evidence in a case of this kind. *Boehmer* v. *Pennsylvania Railroad Company,* 252 U.S. 496, 64 L. Ed. 680; *Chicago Junction R. C.* v. *King,* 222 U.S. 222, 56 L. Ed. 173. But in case the Court may want to examine the evidence, we will briefly summarize the admitted facts and then point out those controlling facts which are not mentioned by petitioner.

In December, 1950, petitioner, plaintiff, J. A. Simpson, a locomotive engineer, was in the employ of defendant, Kansas City Connecting Railroad Company, a railroad operating one locomotive, engaged in the switching and moving of cars in Kansas City, Missouri, and Kansas City, Kansas, at the Kansas City stockyards (Tr. 12, 13). Having no facilities for repairing and servicing its one locomotive, the defendant had made an arrangement with the Union Pacific Railroad Company to make repairs to defendant's locomotive. Under this arrangement the Union Pacific made such repairs at its roundhouse with its crews under its supervision and control and was paid its charges therefor by the defendant, Kansas City Connecting Railroad Company (Tr. 81).

On Saturday, December 23, 1950, plaintiff, the engineer, and his crew took the locomotive to the Union Pacific roundhouse in Kansas City, Kansas, for repairs. The locomotive was moved from the defendant's tracks on to the tracks of the Union Pacific, and while on the Union Pacific's tracks, it was handled and operated by defendant's crew under the rules and regulations of the Union Pacific (Tr. 37, 38).

The locomotive was left at a place near the oil house on No. 1 Union Pacific track, as this was the place which the Union Pacific had designated as the place where such locomotive and other locomotives of the Union Pacific should be placed when in need of repairs (Tr. 15, 16, 19, 37, 38, 39).

For many years it had been the practice of defendant's crew to leave the locomotive at this place near the oil house and to pick it up, after the repairs were made, at the same place (Tr. 37). It was the duty and responsibility of the Union Pacific hostlers or other employees to move the locomotive from the track near the oil house to the roundhouse, and the defendant and its crew had no responsibility to move it from the oil house to or near the roundhouse. It was the responsibility of defendant's crew to leave the locomotive near the oil house and to pick it up at the same place after the repairs were made (Tr. 38, 39).

Plaintiff did not work over the week end nor on Christmas Day. He returned to work on December 26, 1950, and after reporting for work, he and his fireman and switchman went to the Union Pacific roundhouse in Kansas to get the locomotive (Tr. 17, 43, 39). He saw the engine parked near the oil house, the usual and customary place for delivery after repairs and went to the train dispatcher's

office (Tr. 17, 18, 19, 38, 45). The roundhouse boss told plaintiff the engine was ready for service (Tr. 41, 42) and he and his fireman and switchman then walked out to the engine (Tr. 17, 42, 40).

Plaintiff then moved the engine forward about two or three engine lengths and when a lot of steam came off the fireman's side he stopped (Tr. 19, 44).

There followed according to plaintiff's own testimony conduct which the trial court felt showed beyond question that the locomotive was not at the time of plaintiff's accident in "use" and in "service" within the meaning of the Boiler Inspection Act. In his petition for certiorari, the petitioner, while arguing that the locomotive was in "use" and in "service", and that it had not reached the place of repair, fails to disclose to this Court these facts.

When plaintiff found that the locomotive was still leaking steam, he then backed the engine up, but he did not leave it on the track near the oil house, but backed it up a distance of approximately a block or a little further (Tr. 49), and parked it at a spot to the west of and close to the engine dispatcher's office near the roundhouse (Tr. 19, 20, 44, 45). In moving the locomotive from the place near the oil house to the spot near the dispatcher's office, plaintiff was doing the work normally done by hostlers of the Union Pacific (Tr. 46, 48). When plaintiff reached the spot near the dispatcher's office he stopped it, got down from the engine and did not intend to move it any more until the additional repairs were made (Tr. 46).

> Q. When you got to this point, you stopped it where you intended to stop, didn't you, this point by the dispatcher's house (indicated on exhibit)?
>
> A. Yes.
>
> Q. You didn't intend to move that any more, did you?

A. Not unless it was fixed.

Q. Well, now, the Union Pacific hostler could have moved it from the oil house back there, couldn't he?

A. Yes, he could, but he didn't.

Q. As a matter of fact, you were just doing their work when you did it?

A. Maybe so, but it didn't make any difference, it had been done that way before.

It was after the locomotive was taken back to the spot near the dispatcher's office and after he had stopped it and did not intend to move it any more, that his accident occurred while he was making an inspection preliminary to a report he intended to prepare.

Petitioner has failed to mention the above facts in submitting to this Court his argument that the locomotive was in "use" and in "service" at the time of plaintiff's accident.

As stated above, all the cases hold that when a locomotive or car reaches the place of repair, it cannot be in "use" and in "service" within the meaning of the Boiler Inspection Act or Safety Appliance Acts. In his petition for certiorari in this case, petitioner states (page 9):

> "The engine was not at a place where the repairs were to be made but would be moved by the Union Pacific Hostlers from that point to the roundhouse where the repairs were to be made (the repairs could not be made outside), and after repairs would return it to the re-delivery point (Tr. 5, 45)."

In making this statement, petitioner fails to disclose to this Court the undisputed facts showing that at the time of plaintiff's accident, the locomotive had actually reached the place of repair in that it was setting just outside the roundhouse on a track that entered the roundhouse (Tr. 19, 20, 44, 45 and Pl. Ex. 2). In making the argument that the en-

gine had not reached the place of repair because the locomotive had to be moved into the roundhouse, petitioner makes a contention so strained and unrealistic that it approaches absurdity.

At the trial of this case, plaintiff introduced in evidence as Exhibit 2 an aerial photograph showing the roundhouse and scene where the accident occurred. We understand that this photograph which constitutes important evidence in this case has not been made a part of the transcript of the record filed with this Court. We are attaching to this brief copy of such exhibit 2 for the reason it clearly shows the unsoundness of the contention that the locomotive had not reached the place of repair. At the trial plaintiff wrote on this photograph an "X" at the point near the oil house, the place which the Union Pacific had designated as the place where such engine and other engines of the Union Pacific should be placed when in need of repairs (Tr. 22, 15, 16, 19, 37, 38, 39). He marked an "X 1" at the place where the engine was located when the accident occurred (Tr. 22). In moving the locomotive from the place near the oil house (marked "X") to the spot near the roundhouse and the dispatcher's office (marked "X 1") plaintiff was doing the work normally done by hostlers of the Union Pacific (Tr. 46, 48). When plaintiff reached the spot marked "X 1" and stopped the engine he testified that he did not intend to move it any more until the additional repairs were made (Tr. 46).

If the Court will look at the attached photograph it will be readily observed that the point marked "X 1" where the accident occurred is almost at the entrance into the roundhouse, and yet it is petitioner's contention that the engine had not reached the place of repair because it had yet to be moved the few additional feet into the roundhouse. The tracks leading into the roundhouse were roundhouse

tracks and the evidence in this case was undisputed that the place where engines were to be left when in need of repairs was near the oil house (Tr. 22, 15, 16, 19, 37, 38, 39). When plaintiff moved the engine further, doing the work normally done by the hostlers, he moved it right up close to the roundhouse and yet respondent in an attempt to sustain certiorari claims, as he must under the decisions claim, that the engine had not reached the place of repair and that it was still "in service" on "defendant's line." To claim that the locomotive had not reached the place of repair because it still had to be moved a few feet into the roundhouse is, to say the least, most unrealistic. It is obvious that locomotives when moved to a roundhouse cannot all actually be placed inside the roundhouse but must be placed on adjoining tracks and that the place of repair is reached when this occurs.

The facts of this case may be illustrated by an every day transaction. Suppose you take your automobile to a garage for repairs. The garage has a designated place where automobiles are left and where a report is made out concerning the repairs or services needed. Garage employees ordinarily move automobiles from such place to the designated portions of the repair shop where the work is done just as hostlers of the Union Pacific ordinarily moved defendant's locomotive from the oil house to the place where the work was done. Suppose, however, as you start to drive your automobile away you find that it is still not operating properly and you take it back, but instead of leaving it at the designated place, you move it back closer to the work stalls expecting quicker service. You leave the automobile at a place near the work stalls intending to move it no further and intending to make a further report concerning the additional work that may be required. Can it be claimed that the automobile has not

reached the place of repair? Doesn't it reach the place of repair when you first leave it at the designated spot, and isn't the case made even more clear when you move the automobile down near the work stalls, a movement ordinarily handled by the garage employees? We think the instant case is comparable and that there is no reasonable basis for claiming that the locomotive had not reached the place of repair simply because it had not been placed in a stall inside the roundhouse.

III.

The Petition for Certiorari Should Be Denied Because under the Law and the Decisions, It Is Clear That the Engine Was Not in "Use" and in "Service" on Defendant's Line at the Time of Plaintiff's Accident.

The purpose of Congress in enacting the Boiler Inspection Act (45 U.S.C.A. 23) was to fix liability on the railroad if it continued to use in its service in moving traffic on its line a defective locomotive but to protect the railroad from liability where these conditions do not exist. When the bill was before Congress in 1911, it was passed after being reported out favorably by the committee. The committee report which is House Report No. 1974, 61st Congress, Third Session (see Congressional Record, 61st Congress, Third Session, page 2072), includes the following:

> "The bill now reported forbids the railroads from using locomotive engines propelled by steam power *in moving interstate or foreign traffic,* unless the boilers and appurtenances thereof are in proper condition and safe to operate, and unless such boilers shall be inspected from time to time in accordance with the provisions of the Act." (Italics ours).

The courts have consistently held that when a locomotive is withdrawn from service for repairs and is no

longer being used in moving commerce the Boiler Inspection Act does not apply and this Court has repeatedly denied certiorari in such cases. *Lyle* v. *Atchison, T. & S. F. Ry. Co.*, 177 F.2d 221, cert. den. 339 U.S. 913, 70 S. Ct. 574; *Tisneros* v. *Chicago & N. W. Ry. Co.*, 197 F.2d 466, cert. den. 344 U.S. 885, 73 S. Ct. 184; *Flack* v. *Atchison, T. & S. F. Ry. Co.*, 285 Mo. 28, 224 S.W. 415, cert. den. 256 U.S. 690, 41 S. Ct. 449; *New York C. & St. L. Ry. Co.* v. *Kelly*, 70 F.2d 548, cert. den. 293 U.S. 595, 55 S. Ct. 110; *Sherry* v. *Baltimore & O. Ry. Co.*, 30 F. 2d 487, cert. den. 280 U.S. 555, 50 S. Ct. 16.

In the *Lyle* case, it was held that where a locomotive had ended its run and was at a roundhouse for servicing, it was not then being "used" within the Boiler Inspection Act, so as to protect an employee, who was injured while descending from the tender where he had gone to get a forgotten bucket after servicing such locomotive. The Court said, 177 F.2d l.c. 222:

> "Liability under the Act in question, like that under the Safety Appliance Act, 45 U.S.C.A., § 1, *et seq.*, depends not upon negligence but is an absolute one to obey the statutory requirements. For this reason Congress, obviously, in framing each of the Acts, in consideration of the unconditional duty to have cars and locomotives in such condition as not to put in peril life or limb while in use imposed upon the carrier, likewise limited the absolute liability to cars and locomotives while in use 'on the line'. In other words, when a locomotive or car is in 'use on the line', the mandatory duty of the carrier attaches and when the car or engine is not so in use then the duty under the express provisions of the statute does not exist."

This Court denied certiorari.

In the *Tisneros* case plaintiff was injured when he fell due to an icy condition on the steps of a locomotive which

had been withdrawn from service and was at the roundhouse. The Court approved and followed the Lyle case and this Court denied certiorari.

In the *Flack* case the Supreme Court of Missouri held the Boiler Inspection Act did not apply where the locomotive was not in "active service" but had been removed from service and was at a roundhouse. After pointing out the locomotive was not being used in moving traffic, the Court said that the Boiler Inspection Act did not apply because the locomotive had been taken out of service in order that work could be done "to avoid a violation of the provisions of the act whose penalties respondent now invokes." (224 S.W. l.c. 423). This Court denied certiorari.

The *Kelly* case involved a car instead of locomotive. The car had been removed to a place for repairs. The Court of Appeals of the 7th Circuit said: "Since it is clear that the car was not in use, it was erroneous to submit the case to the jury". This Court denied certiorari.

In the *Sherry* case a car had been placed on a side track for repairs and was not being used. The Circuit Court of Appeals of the 6th Circuit said: "The defectively equipped car not having been in use within the meaning of the Safety Appliance Act, at the time of the injury to plaintiff, the verdict was properly directed for the defendant." This Court denied certiorari.

Under the above decisions on which this Court denied certiorari in each case, it is clear that defendant's locomotive was not in use and in service at the time of plaintiff's accident but that it had been withdrawn from service and was on Union Pacific tracks for repairs not completed at the time of plaintiff's accident.

The Boiler Inspection Act is one of the Safety Appliance Acts. The petitioner has cited cases involving cars

rather than locomotives over-looking the fact that liability under the Boiler Inspection Act ceases to exist when a locomotive is taken out of service while liability as to cars (governed by other provisions of the Safety Appliance Acts) applies while a car is being moved to the place of repair after it is withdrawn from service. The Safety Appliance Acts do not include the provision found in the Boiler Inspection Act that the equipment be "in the active service" of the railroad and "in the service to which the same are put." In fact, the provisions of the Safety Appliance Acts specifically include a provision to make the civil liabilities applicable to a car withdrawn from service while being moved to the place of repair. Section 4 of the Act (45 U.S.C.A. 13) includes the following provision not found in the Boiler Inspection Act:

> "Provided, That where any car shall have been properly equipped, as provided in sections 1-16 of this title, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this title, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of sections 1-16 of this title; * * *."

Regardless of the above provision, the decisions applying the Safety Appliance Acts hold that when a car has reached the place of repair on repair tracks of the defendant, the Acts are not applicable and this is true in cases where the injured person was engaged in an inspection preliminary to repairs as in the instant case. *Sherry* v. *Baltimore & Ohio R. Co.*, 30 F.2d 487 (C.C.A. 6), cert. den. 280 U.S. 555, 50 S. Ct. 16; *New York C. & St. L. R. Co.* v. *Kelly*, 70 F.2d 548 (C.C.A. 7), cert. den. 293 U.S. 595, 55 S. Ct. 110.

Even if this case involved a car instead of a locomotive, there would be no liability under the Safety Appliance Acts because the locomotive had reached the place of repair. The only decision of this Court involving facts in any way comparable cited by petitioner is *Brady* v. *Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S.Ct. 426, 82 L. Ed. 614. In the Brady case, the plaintiff Brady was employed by the Wabash as a car inspector. The Terminal Railroad Association had placed a line of fifty cars on a transfer or interchange track at Granite City, Illinois. While inspecting these cars plaintiff fell because of a defect in one car. He sued the Wabash and the Missouri Supreme Court held that the Wabash was not liable because the car at the time of plaintiff's injury was not in service on the Wabash's line. An attempt was made to have the Supreme Court of the United States reverse this opinion, but the Supreme Court denied certiorari. 287 U.S. 538, 77 L. Ed. 538. While the case was pending against the Wabash, plaintiff sued the Terminal Railroad Association. The Supreme Court of Missouri held in *Brady* v. *Terminal Railroad Ass'n*, 102 S.W. 2d 903, 340 Mo. 841, that plaintiff could not recover against the Terminal but this opinion was reversed by the Supreme Court of the United States. This Court held that while the Wabash was not liable, the Terminal was liable

because the car was still in the possession of the Terminal, had not been withdrawn from service for repairs, but was being held on a receiving track temporarily pending continuance of transportation. This Court held that the use of the car which proved defective had not ended when the plaintiff was injured but that the car in question had been placed on a receiving track "temporarily pending the continuance of transportation." The Court distinguished the case from other decisions on the basis that the car had not been withdrawn from use and that the case was not a case where a defective car had reached a place of repair. The Court said, 303 U.S. l.c. 13:

> "The 'use, movement or hauling of the defective car', within the meaning of the statute, had not ended when petitioner sustained his injuries. *Chicago, G. W. R. Co.* v. *Schendel*, 267 U.S. 287, 291, 292, 69 L. Ed. 614, 617, 45 S. Ct. 303. The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair. See *Baltimore & O. R. Co.* v. *Hooven*, (C.C.A. 6th) 297 Fed. 919, 921, 923; *New York C. & St. L. R. Co.* v. *Kelly*, (C.C.A. 7th) 70 F.2d 548, 551. The car in this instance had not been withdrawn from use. *Johnson* v. *Southern P. Co.*, 196 U.S. 1, 21, 22, 49 L. Ed. 363, 371, 25 S. Ct. 158; *Delk* v. *St. L. & S. F. R. Co.*, 220 U.S. 580, 584-586, 55 L.Ed. 590, 594, 595, 31 S. Ct. 617; *Great Northern R. Co.* v. *Otis*, 239 U.S. 349, 351, 60 L.Ed. 322, 323, 36 S. Ct. 124; *Chicago, G. W. R. Co.* v. *Schendel*, 267 U.S. 287, 69 L. Ed. 614, 45 S. Ct. 303, *supra*."

The Court then pointed out that under specific provisions of the Safety Appliance Acts some of its provisions apply to a car removed from service while being hauled to the repair point. It was said, 303 U.S. l.c. 15:

"Even where the required equipment is known to have become defective and the car is being hauled to the nearest available point for repairs, while the Act relieves the carrier in such a case from the prescribed penalties, the carrier still remains subject by the express terms of the statute to civil liability for injuries sustained by 'any railroad employee' in the course of such a movement by reason of the defective equipment. Act of April 14, 1910, chap. 160, § 4, 36 Stat. at L. 299 (45 U.S.C.A., § 13). See *New York, C. & St. L. R. Co.* v. *Kelly*, (C.C.A. 7th) 70 F.2d 548, *supra*."

Accordingly, the Brady case holds that those engaged in the inspection of cars to determine whether their use in service should continue or whether they should be withdrawn from service because of defects that may exist, are protected by the Safety Appliance Acts and that lines of cars and trains while being subjected to such inspection, pending the continuance of transportation, are still in service and in use. The Court recognized that the Act would not be applicable if the car had reached the place of repair.

In *Compton* v. *Southern Pacific Co.*, 161 P. 2d 40, 70 Cal.App. 2d 267, plaintiff was injured while working on a locomotive that was leaking steam because of a defective check valve on the boiler. At the time of the accident, the locomotive was undergoing running repairs at the defendant's roundhouse. The repairs that were being made were of a minor nature. If more extensive repairs had been required, the locomotive would have been placed "in the hole", and would have been marked "out of service". The Court reviewed the *Kelly, Sherry*, and other cases, pointing out that these were cases involving the Safety Appliance Acts. It held that even under those cases there could be no recovery because the locomotive had reached the place of repair, but the Court held that the special language con-

tained in the Boiler Inspection Act distinguished it from other Acts. After referring to the provisions of the Boiler Inspection Act and the different language in the Safety Appliance Act, the Court said, l.c. 45:

> "This language is obviously different from that used in the Boiler Inspection Act which makes it unlawful 'for any carrier to use or permit to be used on its line' any locomotive unless the boiler is safe 'to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb.' 45 U.S.C.A., § 23. This last language was carefully framed to state the thought that the absolute liability being imposed only applied while the locomotive was in actual use on the 'line' of the company in 'active service.'"

The Court in the Compton case discussed the Brady case, pointing out that in the Brady case the car had not been withdrawn from service or moved to a place of repair and that the holding in the Brady case supported the California Court's opinion.

Similarly, in *Atlantic Coast Line R. Co.* v. *Edge*, 81 Ga. App. 606, 59 S.E. 2d 533, a car had been withdrawn from use in order that certain repairs could be made to a running board. In holding that the Safety Appliance Act did not apply, the Court followed the *Lyle* case and with respect to the *Brady* case said, 59 S.E. 2d l.c. 536:

> "The alleged facts in the present case are distinguishable from a situation where a car had not actually been withdrawn from use, but was being inspected to determine whether or not its use should be stopped. See Brady v. Terminal R. Ass'n, 303 U.S. 10, 11, 13, 58 S.Ct. 426, 82 L.Ed. 614, 617."

Petitioner argues that the locomotive was in use on defendant's "line" even though it is conceded that the locomotive was, at the time, on Union Pacific tracks immediately

outside its roundhouse for repairs. Petitioner relies upon a number of cases discussed on pages 9 to 14 of his petition. These cases furnish no support for petitioner's conclusion. In each of the cases the defendant railroads were using lines of other railroads in switching and moving cars and trains. These cases hold that when a railroad arranges with another to use its line for moving its cars and trains, such line becomes the line of the defendant insofar as the Safety Appliance Acts are concerned. Thus, in *United States* v. *New York Central R. Co.*, the defendant railroad was hauling a defective car in a freight train over a connecting carrier's line. The Court held l.c. 763:

> "That the Central was '* * * using, hauling * * *' the defective car on the occasion seems obvious. It became a part of the train at the instance of Central directions. It was moved by Central equipment, manned by Central employees. Its movement was an obligation of the Central to the shippers. Was it being used or hauled upon '* * * its line * * *' as these words are used in the statute? The case of *Philadelphia & Reading Ry. Co.* v. *United States*, 3 Cir., 191 Fed. 1, seems to be the only cited authority in point. It holds in substance that an actionable violation of the Act occurs when an interstate railroad carrier hauls a defective car in its own train, in the control of its own employees, over a line upon which it had a legal right to conduct its interstate traffic."

And in the *Gray* case, 197 Fed. 874, the Court said, l.c. 875:

> "In the recent case of *Philadelphia R. Co.* v. *United States*, 191 Fed. 1, 111 C.C.A. 661, it was held by the Circuit Court of Appeals for the Third Circuit that where a railroad company operated its trains engaged in interstate commerce with its own engines and crews over the tracks of another company under a contract between them, such other tracks are a part of its line within the meaning of the Safety Appliance Act and

its amendments so as to require cars operated upon them to be equipped with safety appliances as therein required. The doctrine of this case, in my opinion, is controlling in the case at bar."

In each of these cases, the arrangement was that the defendant railroad could use the tracks of another railroad for the movement and handling of its cars in interstate traffic. And, in each case, the defective car was being used for such purpose. It seems clear that such cases are no authority for holding that defendant's locomotive was in "use" and "in active service" on its line since the arrangement here was that the tracks of the Union Pacific were to be used only as repair tracks and for reaching the place of repair and not for the movement of cars or locomotives in handling traffic.

CONCLUSION.

The foregoing discussion shows clearly that the petitioner has no sound basis either under the facts or the law for claiming that the trial court erred in holding that plaintiff did not make a case under the Boiler Inspection Act. The facts and the decisions show that petitioner's contentions are unsound particularly in light of the important and controlling facts not mentioned by petitioner. Regardless of such matters, however, the petition should be denied because petitioner is seeking to obtain certiorari on a question which the Supreme Court of Missouri found unnecessary to decide because petitioner did not preserve the point for review on appeal.

Respectfully submitted,

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